Advance Communication, Inc. d/b/a Horn Industries *and* International Association of Electrical Workers, Local Union No. 1. Case 14–CA–22766

April 19, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

Upon a charge filed by the Union on November 5, 1993, and an amended charge on December 27, 1993, the Acting General Counsel of the National Labor Relations Board issued a complaint on December 28, 1993, against Advance Communication, Inc. d/b/a Horn Industries, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge, amended charge, and complaint, the Respondent failed to file an answer.[1]

On March 14, 1994, the General Counsel filed a Motion for Default Summary Judgment with the Board. On March 16, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Default Summary Judgment disclose that the Region spoke with the Respondent's secretary by telephone on January 20, 1994, stating that the Board's Rules and Regulations require an answer to be filed within 14 days of service of the complaint and that the Respondent's answer was past due. The Region confirmed this conversation in a January 21, 1994 letter sent to the Respondent by certified mail. That letter was returned to the Regional Office marked "unclaimed."[2] By letter dated February 17, 1994, and sent by regular mail, the Region stated that if the Respondent failed to file an answer by close of business on February 24, 1994, the filing of a Motion for Summary Judgment would be recommended. This letter was sent to the same address at which the Respondent had been personally served and has not been returned to the Regional Office.[3]

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's Motion for Default Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation authorized to do business in the State of Missouri with an office and place of business in St. Louis, Missouri, and various jobsites located in the State of Missouri. It has been engaged in the building and construction industry as a telephone cabling and installation contractor. During the 12-month period ending November 30, 1993, the Respondent, in conducting its business operations, provided services valued in excess of $50,000 for other enterprises located within the State of Missouri, each of which other enterprises, in the same period, satisfies an appropriate standard for the assertion of jurisdiction by the Board other than solely an indirect standard. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All servicemen engaged in installation, operation, and service work in connection with telephone, radio, television, recording, voice, sound and vision, production and reproduction apparatus, equipment and appliances used for domestic, commercial, education, and entertainment purposes, but EXCLUDING all other employees, clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

About February 1992, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit, pursuant to Section 8(f) of the Act, by entering into a collec-

[1] On February 2, 1994, the Respondent was personally served with a copy of the charge, amended charge, and complaint.

[2] The Respondent's failure to claim certified mail cannot serve to defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

[3] The failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987).

tive-bargaining agreement with the Union for the period of about February 1992 to July 31, 1992, without regard to whether the majority status of the Union has ever been established under the provisions of Section 9 of the Act.[4] About October 1992, the Respondent again granted recognition to the Union as the exclusive collective-bargaining representative of the unit, pursuant to Section 8(f) of the Act, by entering into a collective-bargaining agreement with the Union for the period August 1, 1992, to July 31, 1995, without regard to whether the majority status of the Union has ever been established under the provisions of Section 9 of the Act. For the period from February 1992 to July 31, 1995, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about August 1992, the Respondent bypassed the Union and dealt directly with an employee in the unit by negotiating directly with the employee mileage and overtime pay different from the terms in the collective-bargaining agreements described above.

Since about September 1993, the Union, by letter, has requested that the Respondent furnish the Union the following information:

1. Payroll records of all unit employees for the last two (2) years;
2. All hours worked and gross pay each week, hourly rate, and when rates changed, if they did; and
3. Record of all deductions made from unit employees' pay per week.

The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since about September 1993, the Respondent, by letter dated September 11, 1993, has failed and refused to furnish the Union with the information requested by it.

At all material times the collective-bargaining agreement effective from August 1, 1992, to July 31, 1995, has provided that the Respondent shall:

1. Pay overtime wages to unit employees as specified in Article III, Section 5 of the agreement;
2. Pay mileage to unit employees as specified in Article III, Section 9 of the agreement; and
3. Make benefit contributions on behalf of its employees as specified in Article XI ["Pension Plan"] of the agreement.

The Respondent has failed and refused to continue in effect all terms and conditions of the collective-bargaining agreement by the following conduct:

1. Since at least August 1992, failing to pay overtime wages to unit employees as described above;
2. Since at least September 1992, failing to pay mileage to unit employees as described above; and
3. Since March 1993, by failing to remit benefit contributions as described above.

The Respondent engaged in this conduct without the Union's consent. These terms and conditions of employment are mandatory subjects for the purposes of collective bargaining.

At all material times the collective-bargaining agreement effective from August 1, 1992, to July 31, 1995, has provided a grievance and arbitration procedure pursuant to article VIII of the agreement. Since August 27, 1993, the Respondent has failed to process a grievance filed by the Union on behalf of a unit employee.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has repudiated the collective-bargaining agreement effective from August 1, 1992, to July 31, 1995, has thereby been failing and refusing to bargain collectively and in good faith with the exclusive representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), Section 8(d), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has bypassed the Union and dealt directly with an employee, we shall order the Respondent to abide by the terms of the collective-bargaining agreements for all unit employees and make employees whole for its failure to abide by the collective-bargaining agreements, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent has failed to provide the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, we shall order the Respondent to furnish the Union the information requested.

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required benefit contributions as specified in article XI

[4] Member Browning finds it unnecessary to decide in this proceeding whether the parties' relationship is governed by Sec. 9 or by Sec. 8(f). She notes that in either event the Respondent was obligated to adhere to the terms and conditions of the collective-bargaining agreements.

of the collective-bargaining agreement, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent violated Section 8(a)(5) and (1) by, since at least August 1992, failing to pay contractually required overtime wages to unit employees and, since at least September 1992, failing to pay contractually required mileage to unit employees, we shall order the Respondent to make the unit employees whole for any loss of earnings, including mileage, attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent has failed to process a grievance filed by the Union on behalf of a unit employee, we shall order the Respondent to process the grievance in accord with the collective-bargaining agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Advance Communication, Inc., d/b/a Horn Industries, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Since about August 1992, bypassing the Union and dealing directly with unit employees by negotiating directly with employees mileage and overtime pay different from the terms in the collective-bargaining agreements. The unit includes the following employees:

> All servicemen engaged in installation, operation, and service work in connection with telephone, radio, television, recording, voice, sound and vision, production and reproduction apparatus, equipment and appliances used for domestic, commercial, education, and entertainment purposes, but EXCLUDING all other employees, clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

(b) Since about September 1993, refusing to provide the Union requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

(c) Failing and refusing to continue in effect all terms and conditions of the collective-bargaining agreement which are mandatory subjects for the purposes of collective bargaining, including paying overtime wages and mileage to unit employees and making pension benefit contributions, without the Union's consent.

(d) Failing to process grievances in accord with the collective-bargaining agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor, comply with, and abide by the terms of the collective-bargaining agreement, retroactively to its effective date of August 1, 1992, to July 31, 1995, for all unit employees, including making benefit contributions, paying other amounts due the funds, and paying overtime wages and mileage, and make employees whole, in the manner set forth in the remedy section of this decision.

(b) Furnish the Union the information requested about September 1993.

(c) Process the grievance filed, but not processed since August 27, 1993, in accord with the collective-bargaining agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. April 19, 1994

James M. Stephens,	Member
Dennis M. Devaney,	Member
Margaret A. Browning,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT bypass the Union or deal directly with unit employees by negotiating directly with employees mileage and overtime pay different from the terms in the collective-bargaining agreements with the International Association of Electrical Workers, Local Union No. 1, effective from February 1992 to July 31, 1992, and from August 1, 1992, to July 31, 1995. The unit includes the following employees:

> All servicemen engaged in installation, operation, and service work in connection with telephone, radio, television, recording, voice, sound and vision, production and reproduction apparatus, equipment and appliances used for domestic, commercial, education, and entertainment purposes, but EXCLUDING all other employees, clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT refuse to provide the Union requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

WE WILL NOT fail or refuse to continue in effect all terms and conditions of the collective-bargaining agreement in effect from August 1, 1992, to July 31, 1995, which are mandatory subjects for the purposes of collective bargaining, including paying overtime wages and mileage to unit employees and making pension benefit contributions, without the Union's consent.

WE WILL NOT fail to process grievances in accord with the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor, comply with, and abide by the terms of the collective-bargaining agreement, retroactively to its effective date of August 1, 1992, to July 31, 1995, for all unit employees, including making benefit contributions, paying other amounts due the funds, and paying overtime wages and mileage, and make employees whole, in the manner set forth in a decision of the National Labor Relations Board.

WE WILL furnish the Union the information requested about September 1993.

WE WILL process the grievance filed, but not processed since August 27, 1993, in accord with the collective-bargaining agreement.

ADVANCE COMMUNICATION, INC. D/B/A
HORN INDUSTRIES